

46 Am. Jur. 2d Judges § 153

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Judges

Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IX. Disqualification to Act in Particular Case

B. Grounds for Disqualification

5. Prior Participation in, Connection with, or Knowledge of the Case or Parties as Grounds for Disqualification

c. Prior Participation in or Connection with Case as Attorney as Grounds for Disqualification

§ 153. Statutes providing for disqualification of judge where judge previously served as attorney

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  47(1), 47(2)

A.L.R. Library

[Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case](#),
85 A.L.R.5th 471

In many states, there are constitutional or statutory provisions disqualifying a judge where the judge has been an attorney or of counsel in the case or for any of the parties.¹ The statutes in some jurisdictions provide that a judge who has been an attorney for a party or a member of a law firm representing a party within a certain period of time is disqualified from hearing a case involving that party.² Under some statutes, a judge may not preside at the trial of a case in which the judge has been of counsel unless both the judge and the parties consent.³ Under such a statute, the meaning of the phrase "of counsel," has been found to mean one who actually participated in the prosecution or defense of the case in controversy. It is given its plain and ordinary meaning and should apply to a judge who is actually involved in the prosecution or defense of an accused's case.⁴

Observation:

Under a statutory or constitutional prohibition against a judge hearing a case in which the judge has acted as counsel, disqualification is only required when the judge has participated as counsel in the very case which is before the judge.⁵

Pursuant to the federal statute regarding the disqualification of judges, the judge must disqualify him- or herself where in private practice the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.⁶ In addition, the judge must disqualify him- or herself where the judge has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.⁷

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Footnotes

- 1 In re Arthur S., 228 Cal. App. 3d 814, 279 Cal. Rptr. 69 (5th Dist. 1991); People v. Houston, 179 Mich. App. 753, 446 N.W.2d 543 (1989); Ortiz v. City of New York, 136 Misc. 2d 500, 518 N.Y.S.2d 913 (Sup 1987); Teehee v. Teehee, 1990 OK CIV APP 78, 798 P.2d 1095 (Ct. App. 1990); State v. American TV and Appliance of Madison, Inc., 151 Wis. 2d 175, 443 N.W.2d 662 (1989).
- 2 Mayo v. Beber, 177 Cal. App. 2d 544, 2 Cal. Rptr. 405 (2d Dist. 1960); People v. Houston, 179 Mich. App. 753, 446 N.W.2d 543 (1989).
- 3 Scogin v. State, 138 Ga. App. 859, 227 S.E.2d 780 (1976); Medley v. State, 600 So. 2d 957 (Miss. 1992); Hill v. Hill, 1950 OK 183, 203 Okla. 260, 220 P.2d 450 (1950).
- 4 Turner v. State, 573 So. 2d 657 (Miss. 1990).
- 5 Gamez v. State, 737 S.W.2d 315 (Tex. Crim. App. 1987).
- 6 28 U.S.C.A. § 455(b)(2).
As to disqualifying the judge for serving as a lawyer in the "matter in controversy" under canons and rules, see § 154.
As to disqualification under 28 U.S.C.A. § 455(b)(2) on the basis that a judge or a lawyer with whom he or she previously practiced law served as a lawyer concerning the matter in controversy, see Am. Jur. 2d, Federal Courts § 91.
- 7 28 U.S.C.A. § 455(b)(3).
As to disqualification under 28 U.S.C.A. § 455(b)(3) on the basis of the judge's former employment by the government, see Am. Jur. 2d, Federal Courts § 92.

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